

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CITY OF GRASS VALLEY,)	
)	2:04-cv-149-GEB-DAD
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
NEWMONT MINING CORPORATION, a)	
corporation; NEWMONT USA LIMITED,)	
a corporation; NEWMONT NORTH)	
AMERICA EXPLORATION LIMITED, a)	
corporation; NEWMONT GOLD COMPANY,)	
a corporation; NEWMONT NORTH)	
AMERICA LIMITED, a corporation;)	
NEWMONT EXPLORATION LIMITED, a)	
corporation,)	
)	
Defendants.)	
_____)	

Plaintiff moves to amend the Scheduling Order and moves to amend its complaint to add the following additional Defendants: New Verde Mines LLC, Newmont North America LLC,¹ Newmont International Services Limited, Newmont Realty Company, and Newmont Capital Limited

¹ The parties agreed at the hearing that New Verde Mines LLC and Newmont North America LLC are the same entity. New Verde Mines LLC changed its name to Newmont North America LLC.

1 (collectively "Related Newmont Entities"). Defendants oppose
2 Plaintiff's motions.

3 BACKGROUND

4 A Scheduling Order issued on May 12, 2006, which contains a
5 provision prohibiting further joinder of parties or amendment of
6 pleadings "except with leave of Court, good cause having been shown."
7 (Order, May 12, 2006, at 1.) Plaintiff argues it has demonstrated
8 "good cause" justifying the amendments it seeks. (Pl.'s Mot. to Amend
9 at 6:16-17.) Defendants disclosed in July 2004, as part of their
10 initial discovery, a chain of title guarantee listing New Verde Mines
11 LLC as the holder of mineral rights under Plaintiff's Wastewater
12 Treatment Plant. (Aff. of Thayer, Ex. 3 at 3.) The parties
13 subsequently conducted settlement negotiations and agreed to stay the
14 action for the purpose of trying to reach a settlement from February
15 1, 2005 through August 1, 2005 and again from December 5, 2005 through
16 April 5, 2006. (Order, Dec. 6, 2005, at 1-2.)

17 Beginning in August 2006, Plaintiff asked several deponents
18 about New Verde Mines LLC and its relationship to Defendant Newmont
19 Mining Company's involvement in Grass Valley, but the deponents were
20 unable to explain the relationship. (Bardwick Decl., Ex. G at 2, Ex.
21 I at 2.) In December 2006, Plaintiff notified the current Defendants
22 of its intention to move to amend its complaint to add New Verde Mines
23 LLC and Newmont North America LLC as Defendants. (Id., Ex. J at 1.)
24 Plaintiff then deposed Defendants' "person most knowledgeable"
25 regarding corporate structure in January 2007. (Id., Ex. O.) In
26 addition, in February 2007, Defendants admitted through a Request for
27 Admissions that New Verde Mines LLC and Newmont Realty Company were
28 wholly owned subsidiaries of Defendant Newmont USA Limited and that

Newmont Mining Corporation owns shares in Newmont Capital Limited. (Id., Ex. S at 3, 11.) Plaintiff then filed this motion on March 23, 2007 to amend the scheduling order and to amend its complaint. (Pl.'s Mot. to Amend at 1.) The motion was argued on April 30, 2007.

DISCUSSION

I. Amending the Scheduling Order

Plaintiff asserts it has good cause to amend the portions of the Scheduling Order establishing the deadline for amendment of pleadings. (Pl.'s Mot. to Amend at 6:16-17.) Defendants rejoin good cause does not exist to justify allowing Plaintiff to make further amendments. (Defs.' Opp'n at 2:21.)

Federal Rule of Civil Procedure 16² provides that a pretrial Scheduling Order "shall not be modified except upon a showing of good cause and by leave of the district judge." "Rule 16(b)'s good cause standard primarily considers the diligence of the party seeking the amendment." Johnson v. Mammoth Recreations, 975 F.2d 604, 609 (9th Cir. 1992) (internal quotation marks omitted).

[T]o demonstrate diligence under Rule 16's good cause standard, the movant may be required to show the following: (1) that [it] was diligent in assisting the Court in creating a workable Rule 16 order, (2) that [its] noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding [its] diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference, and (3) that [it] was diligent in seeking amendment of the Rule 16 order, once it became apparent that [it] could not comply with the order.

Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D. Cal. 1999) (internal quotation marks omitted).

² All further Rule references are to the Federal Rules of Civil Procedure.

1 A. Creating a Workable Order

2 Defendants argue Plaintiff was not diligent in creating a
3 workable Rule 16 order because Plaintiff filed three status reports in
4 which Plaintiff said it had no intention of adding Defendants and then
5 subsequently moved to amend its Complaint to add Defendants. (Defs.'
6 Opp'n at 4:13-14.) Plaintiff rejoins that when those status reports
7 were filed Plaintiff "simply did not yet know the identity and
8 relationships among the Related Newmont Entities" and therefore,
9 Plaintiff did not know it would move at a later date to add
10 Defendants. (Pl.'s Mot. to Amend at 5:1-3.) In addition, Plaintiff
11 responds that it participated in all scheduling discussions and agreed
12 to a "Joint Stipulation and Order for Extension of Time" with
13 Defendants to modify the law and motion deadlines. (Pl.'s Mot. to
14 Amend at 7:10-19.)

15 Nothing in the record indicates Plaintiff knew it would seek
16 to amend its complaint at the time the status reports were filed.
17 Since Plaintiff participated in creating a workable Rule 16 order,
18 Plaintiff has shown diligence.

19 B. Development of Unforeseen Matters

20 Plaintiff asserts that although it was aware of the
21 existence of New Verde Mines LLC and Newmont North America LLC in
22 2004, it was not aware of the relationship between these entities and
23 Newmont; nor was it aware of the role these entities played in
24 Newmont's Grass Valley operations until the close of discovery.
25 (Pl.'s Reply at 3:5-9.) Therefore, Plaintiff asserts it has good
26 cause to amend its complaint. (Id.) Defendants countered at the
27 hearing that Plaintiff received documents listing New Verde Mines LLC
28 as the mineral rights holder underneath Plaintiff's property as early

1 as 2004. Defendants further asserted that since Newmont is a publicly
2 traded company, Plaintiff could have ascertained the relationship
3 between the other Related Newmont Entities through public records
4 searches before the close of discovery. Defendants argued that
5 therefore, Plaintiff was not diligent conducting discovery and has not
6 shown good cause to amend its complaint.

7 i. New Verde Mines LLC & Newmont North America LLC

8 Plaintiff admitted at the hearing that it received the chain
9 of title guarantee in 2004 listing New Verde Mines LLC as the holder
10 of mineral rights in Grass Valley. Plaintiff asserts, however, that
11 the chain of title guarantee was part of a 30,000 document production
12 from Defendants, that Newmont has hundreds of related entities, and
13 therefore, it was difficult and time consuming for Plaintiff to
14 accurately determine which of Newmont's related entities should be
15 joined in this litigation.

16 The diligence issue concerns whether Plaintiff's counsel
17 acted as a reasonable attorney would have acted in pursuing
18 information in a similar situation. White v. Sabatino, 2007 U.S.
19 Dist. LEXIS 18760, *12 (D. Haw. Mar. 16, 2007) (holding plaintiff was
20 diligent despite not uncovering relevant information during discovery
21 because it would not be readily ascertainable by reasonable counsel).
22 This is a difficult question to decide.

23 Plaintiff did not uncover the relevant information regarding
24 the relationship between New Verde Mines LLC and Newmont Mining
25 Corporation until the close of discovery. Plaintiff did take steps to
26 attempt to acquire this information, but whether additional steps
27 should have been taken in 2004 is not patently clear. Plaintiff had
28 to wade through thousands of documents about hundreds of related

1 entities, and therefore, Plaintiff appears to have been diligent in
2 its search for the relevant information. In addition, Plaintiff was
3 aided in its endeavor to investigate the public records when it hired
4 a public record search firm where at least two specialists conducted
5 public records searches. However, Plaintiff stated at the hearing
6 that these experts were unable to determine the relationship between
7 the Related Newmont Entities because of missing documents in the
8 record. The record presents a difficult question on the issue of
9 whether Plaintiff was diligent in pursuing discovery regarding New
10 Verde Mines LLC and Newmont North America LLC. But Plaintiff's
11 showing meets the bare minimum required to have the Scheduling Order
12 amended.

13 ii. Remaining Related Newmont Entities

14 Plaintiff further contends it was diligent in pursuing
15 information regarding the remaining Related Newmont Entities.
16 Defendants do not point to any documents disclosed during discovery
17 that should have reasonably alerted Plaintiff to the remaining Related
18 Newmont Entities' relationship to Newmont Mining or their involvement
19 in Newmont's Grass Valley operations. Instead, Defendants argued at
20 the hearing that Plaintiff was not diligent because Plaintiff should
21 have discovered this information through public records. Plaintiff
22 rejoined that despite conducting public records searches, it was
23 unable to ascertain the necessary information regarding which Newmont
24 entities were proper Defendants.

25 Although Plaintiff was unable to uncover the relevant
26 information before the close of discovery, Plaintiff has shown it took
27 reasonable steps to ascertain the relationship of the Related Newmont
28 Entities through public record searches. Therefore, Plaintiff was

1 diligent and its inability to comply with the Scheduling Order is
2 based on reasonably unforeseen events.

3 C. Diligence in Seeking Amendment

4 Plaintiff asserts it sought to amend as soon as it
5 reasonably could. (Pl.'s Mot. at 7:26-27.) Defendants rejoin
6 Plaintiff's delay is inexcusable. (Defs.' Opp'n at 4.)

7 Plaintiff sent Defendants a letter on December 5, 2006
8 informing Defendants of its intention to move to add New Verde Mines
9 LLC and Newmont North America LLC as Defendants and also specified
10 that Plaintiff "anticipate[d] that additional Newmont entities may
11 become known during the remaining months of discovery." (Bardwick
12 Decl., Ex. J at 1.) Plaintiff then conducted its deposition of
13 Defendants' "person most knowledgeable" on corporate structure in
14 January 2007 and received Defendants' responses to its Request for
15 Admissions in February 2007. (Id., Ex. O, Ex. S.) Plaintiff filed
16 this motion on March 23, 2007. (Pl.'s Mot. to Amend at 1.)

17 Plaintiff did not have sufficient evidence to move to amend
18 its complaint to add the Related Newmont Entities prior to Plaintiff's
19 deposition of Defendants' person most knowledgeable in January 2007
20 and Defendants' answers to Plaintiff's Request for Admissions in
21 February 2007. It is understood that it takes time to prepare a
22 motion before it can be filed and therefore, it was not unreasonable
23 for Plaintiff to wait until March 2007 to file its motion.

24 D. Prejudice

25 Defendants assert they will suffer prejudice if Plaintiff's
26 motion is granted because "[d]iscovery has closed, dispositive motions
27 have been filed, and the parties are preparing for trial in five
28 months." (Defs.' Opp'n at 5:9-10.) Plaintiff rejoins that it does

1 not seek any additional discovery and does not seek to change any of
2 the other dates set by the Scheduling Order. (Pl.'s Reply at 6:25-
3 27.) In addition, Plaintiff asserts it "provided Newmont more than
4 adequate notice of its intent to move for this amendment, precisely to
5 avoid any possibility of prejudice." (Pl.'s Reply at 25-26.)

6 Although the focus of analysis under Rule 16 is on the
7 diligence of the moving party, "the existence or degree of prejudice
8 to the party opposing the modification might supply additional reasons
9 to deny a motion." Jackson, 186 F.R.D. at 607. However, a delay in
10 the litigation proceedings is insufficient to deny a request to amend.
11 See DCD Programs, Ltd v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987).
12 Likewise, extending deadlines for discovery, in light of information
13 Plaintiff learns through discovery, is not the type of prejudice that
14 precludes amendment under Rule 16. Fru-Com Constr. Corp. v.
15 Sacramento Mun. Util. Dist., 2006 U.S. Dist. LEXIS 94421, *16-17 (E.D.
16 Cal. Dec. 15, 2006). In addition, allowing an amendment to add
17 Defendants which makes a case more complicated is not prejudice
18 sufficient to preclude amendment under Rule 16. Id.

19 Defendants will not suffer the type of prejudice which
20 justifies precluding amendment under Rule 16. Therefore, Plaintiff
21 has shown good cause to amend the Scheduling Order.

22 II. Amending the Complaint

23 Plaintiff asserts the Related Newmont Entities meet the
24 requirements for joinder under Rule 20 because Plaintiff alleges they
25 are jointly and severally liable for Newmont's actions in Grass
26 Valley. (Pl.'s Mot. at 8:24-25.) Defendants do not respond to this
27 argument.

1 Rule 20 provides that joinder is proper when the right to
2 relief against the party to be joined is asserted jointly or
3 severally. Since Plaintiff asserts joint and several liability
4 against the Related Newmont Entities, Plaintiff's motion to amend its
5 complaint is granted.

6 III. Pending Summary Judgment Motion

7 Currently cross motions for summary judgment are pending and
8 are set for hearing on May 14, 2007. Defendants stated at the hearing
9 that if Plaintiff's motion to amend were granted, the pending summary
10 judgment motion would need to be "restyled" to include the additional
11 Defendants. Therefore, the May 14, 2007 hearing on the motions for
12 summary judgment is vacated and rescheduled to commence at 10:00 a.m.
13 on June 11, 2007. If either party's pending motion requires changes
14 to incorporate the additional Defendants, the revised motions shall be
15 filed by May 17, 2007. Any opposition shall be filed by May 25, 2007
16 and any reply shall be filed by June 4, 2007.

17 CONCLUSION

18 Plaintiff has five days from the date on which this Order is
19 filed to file and serve its Third Amended Complaint.

20 IT IS SO ORDERED.

21 Dated: May 9, 2007

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23 
24 GARLAND E. BURRELL, JR.
25 United States District Judge
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